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No. 393

In the Supreme Court of the United States

OCTOBER TERM, 1932

FEDERAL TRADE COMMISSION, PETITIONER

v.

ROYAL MILLING COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Specification of errors to be urged	9
Summary of argument	9
Argument:	
I. The findings of the Commission that respondents diverted trade from competitors by falsely representing that they were mills and manufacturers of flour are supported by evidence	11
II. The Commission properly concluded that its orders would be in the public interest	18
Conclusion	27
Appendix (Federal Trade Commission Act, Sec. 5)	28–31

CITATIONS

American Washboard Co. v. *Saginaw Mfg. Co.*, 103 Fed. 281	21
Brougham v. *Blanton Mfg. Co.*, 249 U. S. 495	26
Federal Trade Commission v. *Balme*, 23 F. (2d) 615, certiorari denied, 277 U. S. 598	22, 24
Federal Trade Commission v. *Klesner*, 280 U. S. 19	8, 10, 19
Federal Trade Commission v. *Pure Silk Hosiery Mills, Inc.*, 3 F. (2d) 105	24
Federal Trade Commission v. *Raladam Co.*, 283 U. S. 643	11, 17
Federal Trade Commission v. *Sinclair Refining Co.*, 261 U. S. 463	20
Federal Trade Commission v. *Winsted Hosiery Co.*, 258 U. S. 483	10, 16
Fluegelman & Co., v. *Federal Trade Commission*, 37 F. (2d) 59	26
Freight Bureau v. *Southern Railway Co.*, 41 I. C. C. 483	13, 25
Ohio Leather Co. v. *Federal Trade Commission*, 45 F. (2d) 39	23
Piedmont & Northern Ry. Co. v. *Interstate Commerce Commission*, 286 U. S. 299	13
Royal Baking Powder Co. v. *Federal Trade Commission*, 281 Fed. 744	21
Federal Trade Commission Act, Sec. 5, c. 311, 38 Stat. 717, 719 (U. S. C., Title 15, Sec. 45)	28–31

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OPINION BELOW

The opinion of the Circuit Court of Appeals for the Sixth Circuit (R. Vol. II, 189[1]) is reported in 58 F. (2d) 581.

JURISDICTION

The decrees of the Circuit Court of Appeals were entered on May 4, 1932. (R. Vol. II, 192.) The time for filing a petition for certiorari was duly extended by an order of one of the Justices of this Court to September 24, 1932. (R. Vol. II, 193.)

[1] Unless otherwise indicated all record references are to Vol. I.

Petition for certiorari was filed September 23, 1932, and was granted October 24, 1932. (R. Vol. II, 193.)

The jurisdiction of this Court rests on Section 5 of the Federal Trade Commission Act, c. 311, 38 Stat. 717, 719 (U. S. C., Title 15, Sec. 45), and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The principal question presented is whether, in a proceeding under Section 5 of the Federal Trade Commission Act, the Commission must find that respondents' product is injurious to the consumer or inferior to that of competitors, in order that the proceeding may be in the public interest. A question which this Court may also wish to consider is whether the Commission's findings that respondents diverted trade from competitors by falsely representing that they are milling companies and manufacturers of flour are supported by evidence.

STATUTE INVOLVED

The material portions of Section 5 of the Federal Trade Commission Act are set forth in the Appendix, *infra,* pp. 28–31.

STATEMENT

This is a proceeding to review six orders entered by the Federal Trade Commission under Section 5 of the Federal Trade Commission Act, each of which directed the respective respondents to cease and desist from selling flour in interstate commerce

under a trade name which includes the words "Milling Company" or words of like import, and from representing that they manufacture flour or that the flour sold by them goes direct from manufacturer to purchaser, unless and until they operate a mill which makes flour by grinding wheat.

In each of these cases the allegations of the amended complaint filed by the Commission and its findings of fact, conclusion, and order are substantially similar, and in each case the same evidence [2] was, by stipulation, made a part of the evidence before the Commission.[3] We shall therefore set forth the allegations in only one of the amended complaints (that of the Royal Milling Company) and the findings of the Commission in that case, which may be taken as typical of the other five.

The amended complaint in that case charges that the respondent partnership (which will be referred to in this connection as the respondent) sells plain and self-rising flour by means of false representations that it is a milling company and manufacturer of flour; that these representations have the capacity and tendency to lead dealers and prospective purchasers of its product to believe that they are

[2] The evidence thus stipulated was taken in a proceeding against a seventh blending concern (R. 23, 35), which is not a party to the present suit.

[3] R. 13–17; Vol. II, 12–15, 48–52, 86–90, 126–130, 162–165; 26–35; Vol. II, 26–35, 64–73, 102–112,, 140–150, 176–187; 23; Vol. II, 22, 60, 98, 137, 172.

buying direct from a miller or manufacturer of flour and without the intervention of a middleman or the cost of a middleman's profit; and that these acts and practices are prejudicial to the public and constitute unfair methods of competition in interstate commerce. (R. 13–17.)

After testimony had been taken before an examiner (R. 35), the Commission made the following findings of fact:

Respondent's place of business is at Nashville, Tennessee,[4] and it does business under the names Royal Milling Company, Richland Milling Company, and Empire Milling Company. (R. 26–27.) Under these trade names it sells plain and self-rising flour in bags to dealers located in various States, but particularly in the Southeastern States, from 5 to 8 brands being sold under each trade name. (R. 27.) Respondent does not grind wheat into flour, but it mixes together and stirs up in a batch mixer, flour which it buys from concerns which grind wheat into flour. (*Ibid.*) If the flour is to be self-rising, the correct proportions of salt, soda, and phosphate are added in the mixer; if it is to be plain flour, a little phosphate is added in the mixer. (*Ibid.*) The flour is run from the batch mixer into bins, from which it is elevated to a reel or sifter. (*Ibid.*) After being sifted it is packed into bags of the desired sizes. (*Ibid.*)

[4] Each of the other 5 respondent concerns is also located at Nashville. (R. Vol. II, 27, 65, 103, 141, 171.)

The entire operation takes from ten to fifteen minutes and the machinery in a plant like respondent's, with a capacity of 3,000 barrels a day, costs from $20,000 to $25,000. (*Ibid.*)

Respondent does not maintain a laboratory for testing or analyzing the flours which it buys or sells.[5] (R. 30.) It uses regularly only the so-called paddle test, which consists in simply putting the flour on a paddle and looking at it.[5] (*Ibid.*) The characteristics of the flour, such as the content of gluten, protein, moisture, starch, etc., can not be determined by this test.[5] (*Ibid.*) The test discloses only the relative appearance of the flour and this is of little value in even approximating its grade, because practically all concerns grinding wheat into flour add phosphate and a bleaching agent to the flour in the mill stream.[5] (*Ibid.*) Different concerns add different amounts, and a greater amount of bleaching makes a lower grade of flour appear better. (R. 30–31.) The quality or grade of the flour is not changed by mixing self-rising ingredients with it and running it through the equipment in respondent's plant. (R. 31.)

The machinery of a concern grinding wheat into flour, with a capacity of 3,000 barrels a day, costs about $600,000. (R. 29.) Grinding flour from wheat requires from a half hour to one and a half hours, or, if the time required for tempering the

[5] No such finding was made (R. Vol. II, 69) in the case of Nashville Roller Mills (No. 6099 in the court below).

wheat is included, from 8 to 60 hours. (*Ibid.*) Grinding is a complex and scientific process. (R. 28.) Prior to grinding, the wheat must be cleaned, graded, and tempered. (*Ibid.*) After it has been passed through rollers, it is sifted or bolted, and the siftings are carried in various streams to other sets of rollers where they are again crushed or ground. (*Ibid.*) The number of times this process of successively grinding and sifting is repeated differs in different mills. (*Ibid.*) Most of the concerns grinding wheat into flour and selling in the Southeastern States make self-rising flour, and they also make blended flour by blending different wheats or by blending various streams of flour produced in grinding the wheat. (R. 29, 30.)

Concerns grinding wheat into flour maintain a laboratory and an experimental mill in charge of a chemist, in which the wheats and flours are analyzed and tested in order to determine their various characteristics. (R. 29.) It is only from chemical tests that the contents of the flour can be determined and the uniformity of each brand of flour maintained. (*Ibid.*) All grinding mills produce and sell various grades of flour. (*Ibid.*)

When the term "mill," "milling company," or "manufacturer of flour" is used in the flour industry, it is generally understood by dealers and the purchasing public to mean a concern that grinds wheat into flour. (R. 32.) From time immemorial plants buying and blending flour but not grinding

wheat have been known as blending plants. (R. 31.) Many dealers and consumers prefer to buy flour from a concern grinding wheat into flour rather than from one which merely mixes and packs flour, because they think they get from the former a more uniform product, or a better product for less money because of the elimination of the middleman's profit or costs. (R. 32–33.) The names under which respondent does business and its representations have led many persons, dealers, and consumers who buy its products to believe that it is a concern grinding wheat into flour. (R. 33.) Respondent's use of these trade names and its representation that it is a manufacturer of flour tend to and do divert trade to it from concerns which grind wheat into flour, and from concerns engaged in the same character of business as respondent but not doing business under such trade names or representing that they are manufacturers of flour. (*Ibid.*)

In each of the six cases here under review the Commission concluded (R. 33; Vol. II, 33, 71, 110, 148, 185) that the practices set forth in its findings of fact were to the prejudice of the public and respondents' competitors and were unfair methods of competition in interstate commerce, and it entered the cease and desist orders previously described (*supra*, pp. 2–3). Each of the six concerns affected then filed in the Circuit Court of Appeals for the Sixth Circuit a petition to review the Com-

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mission's order. (R. Vol. II, 195, 198, 202, 205, 209, 212.)

The Circuit Court of Appeals disposed of the six cases in one opinion. (R. Vol. II, 189.) It held (R. Vol. II, 189–190) that the petitioners (respondents here) were in active competition with grinding mills, and it did not disturb (R. Vol. II, 191) the Commission's findings that these petitioners sold their product by means of misrepresentations which diverted trade from competitors. But it held, on the authority of *Federal Trade Commission* v. *Klesner,* 280 U. S. 19, that the requirement of the statute that the proceeding be "to the interest of the public" was not satisfied. It said (R. Vol. II, 191):

> It is not shown that the petitioners' product is injurious to the consumer, or that it is in any way different from or inferior to the product of their competitors. Nor did the commission so find. * * * There is no finding that either dealer or consumer obtained an inferior product, or a product other than he sought to purchase. The case differs, therefore, in the essential prerequisite of public injury from *Federal Trade Commission* v. *Winsted Company* (258 U. S. 483) and *Federal Trade Commission* v. *Good-Grape Company, supra.* Failing to see any public injury, or financial loss in the methods of competition here reviewed, we find no public interest exists, much less one that is specific and substantial. If there is any deception in the petitioners' representa-

tions or trade names, it amounts at most to a private wrong, as in the *Klesner case,* and one not to be redressed by action of the commission.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In holding that the proceeding was not in the public interest within the meaning of Section 5 of the Federal Trade Commission Act in view of the absence of any finding by the Commission or proof that respondents' product "is injurious to the consumer, or that it is in any way different from or inferior to the product of their competitors."

2. In holding that any deception which results from respondents' use of the trade names and representations "amounts at most to a private wrong * * * and one not to be redressed by action of the commission."

3. In holding that upon the findings of fact and conclusions of the Commission the cease and desist orders made were not within the jurisdiction of the Federal Trade Commission.

4. In setting aside the cease and desist orders of the Federal Trade Commission.

SUMMARY OF ARGUMENT

I. The evidence amply supports the Commission's findings that respondents represent themselves to be mills or milling companies, and manufacturers of flour; that the trade and the public

understand these terms to mean a concern which grinds wheat into flour; that respondents do not grind wheat, but mix or blend flour purchased from grinding mills; that respondents' representations deceive many of their customers and tend to divert trade from grinding mills because of the preference of a substantial portion of the trade for flour made by grinding mills. Respondents' misrepresentations are "unfair" methods of competition. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483. Both the Commission and the court below found that respondents sell in competition with grinding mills. The volume of respondents' business (over $5,600,000 in 1929) shows that their misrepresentations threaten these competitors with injury to a substantial extent.

II. The Commission correctly concluded that the proceeding was in the public interest. The practices complained of affect a large volume of commerce, many competitors and a still larger number of purchasers. Since the primary object of the Act is maintenance of fair competition, the court below erroneously applied as the sole test of public interest, in the absence of flagrant oppression of the weak by the strong, protection of the health or pecuniary interests of the ultimate consumer. This case is within the dictum of *Federal Trade Commission* v. *Klesner*, 280 U. S. 19, that an unfair practice which is serious and widespread may be a matter of public concern where no private

suit to stop it would be brought. It is of public concern to prevent deceptive practices calculated to deprive purchasers of the opportunity to exercise a preference for the product of competitors and calculated to deprive competitors of the advantage of this preference. We submit that the decision of the court below is unsound and contrary to the interpretation which the courts have previously placed upon Section 5 of the Federal Trade Commission Act.

ARGUMENT

I

THE FINDINGS OF THE COMMISSION THAT RESPONDENTS DIVERTED TRADE FROM COMPETITERS BY FALSELY REPRESENTING THAT THEY WERE MILLS AND MANUFACTURERS OF FLOUR ARE SUPPORTED BY EVIDENCE

In the recent case of *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 646–647, this Court defined the scope and application of Section 5 of the Federal Trade Commission Act as follows:

> By the plain words of the act, the power of the Commission to take steps looking to the issue of an order to desist depends upon the existence of three distinct prerequisites: (1) that the methods complained of are *unfair;* (2) that they are methods of *competition* in commerce; and (3) that a proceeding by the Commission to prevent the use of the methods appears to be in the *interest of the public.*

We shall deal later with the question whether the Commission's orders were in the public interest. (*Infra*, pp. 18–25.) We propose now to show that the practices against which the orders were directed are unfair and that they are methods of competition in commerce. In this connection it should be noted that the statute makes the Commission's findings of fact, "if supported by testimony," conclusive. (*Infra*, p. 31.)

Both the Commission and the court below have found that respondents sell their product in competition with grinding mills and we understand that respondents do not question this finding. There was also evidence that certain concerns selling flour in the Southeastern States, which, like respondents, merely mix, blend, and pack flour, do not call themselves mills or milling companies. (R. 297–300, 305–307.)

The unfair method of competition charged and found in this case is that respondents represent themselves to be mills, milling companies, or manufacturers of flour, when, in fact, they are not. Respondents are not mills and they are not so regarded in the trade. The belief is universal in the trade that a mill is a concern which grinds wheat into flour. (R. 125, 132, 136, 194, 217, 264, 271.) Those in the trade who are familiar with the character of respondents' operations refer to them, not as mills, but as "blenders" or "mixers." (R. 435, 442, 481, 514, 517.)

In the light of this testimony it is immaterial that grinding mills, when they mix self-rising flour, employ the same machinery and process as respondents. It is not the use of this machinery or process which gives them the classification of mill or milling company. *Freight Bureau* v. *Southern Railway Co.*, 41 I. C. C. 483, upon which respondents relied in the court below, does not support them since the Interstate Commerce Commission expressly refused (p. 497) to pass upon the question whether or not the treatment accorded self-rising flour is "milling." And the alleged classification of respondents by the Census Bureau as "re-manufacturers" has no bearing upon the propriety of their use of the terms "mill," "milling company," and "manufacturer." Even if this were otherwise, it would not be binding in this proceeding. See *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, 312.

There is also ample evidence that respondents' misrepresentations as to the nature of their business deceive many of their customers and tend to divert trade to respondents. Many of these customers testified that they thought that respondents were millers, at least until this proceeding commenced, or, in some instances, until being called to testify. (R. 139–140, 142–143, 145, 190, 218–219, 266, 267–268, 386, 411, 424, 446.) A substantial number of these customers testified that they preferred to buy from a concern which grinds wheat

into flour. (R. 125, 132, 137, 142, 150, 195, 264, 272.) They gave as a reason for this preference that they thus expected to get a better price (R. 148, 219, 268), or superior quality (R. 195, 208, 210, 212–213, 215), or a more uniform product (R. 121, 125, 137, 265).

All but two of the respondent concerns employ two or more trade names, each containing the words "milling company," or like words. (R. 27; Vol. II, 65, 103, 141.) We submit that the adoption of these trade names was not merely accidental. It indicates that respondents themselves believe that a substantial part of the flour trade prefers to buy from milling companies. It also indicates that they have deliberately attempted to obtain the advantage of this preference. Thus the Nashville Roller Mills, a corporation, does business not only under its own name, but also under the trade names Cumberland Valley Milling Company, Belle Meade Mills, and The Red Mill. (R. Vol. II, 64–65.) The Snell Milling Company, a corporation, does business both under its own name and under the trade names Mero Mills and Peabody Mill Company.[6] (R. Vol. II, 102–103.)

That respondents themselves believe that a substantial part of the flour trade prefers to buy flour

[6]Another blender against whom the Commission filed a complaint, but not involved in this proceeding, has operated under the names Watauga Milling Company, F. J. McCarthy Milling Company, Southern Flour Mills Company, Modern Milling Company, and Star Mills. (R. 35, 39–40, 51–52.)

from grinding concerns is further shown by the fact that respondents, in addition to employing these trade names, make representations calculated to induce the belief that they are mills converting wheat into flour, rather than merely blenders or mixers of flour. The State Milling Company has made the following statements in letters, circulars, and literature circulated among the trade (R. Vol. II, 145–146.)

> Our products are made from select wheat in a perfectly equipped mill by millers who know how.
>
> ---
>
> We are glad to be able to give you advantage of the exceedingly good purchases we have made in wheat and we now call your attention to our Greatly Reduced Prices. * * *
>
> When you buy from us you are buying direct from the mill, thereby eliminating all unnecessary middleman's profit. Our flour is made from #2 soft red wheat acknowledged to be the best wheat grown for the manufacture of flour, and we invite a comparison of its quality with any other flour regardless of price.
>
> ---
>
> For the past six weeks we have had a nice stock of wheat on hand and have been giving you the advantage of it by quoting you considerable lower than the market, however our supply bought on the lower market is about exhausted and to-day cash wheat is

> very strong * * * making flour advance in proportion to this.

> We are very anxious for you to give our flour a trial for it is made from the best #2 red wheat which produces a product unequalled and our overhead is very light which enables us to sell cheaper than most of our competitors.

The record discloses similar statements circulated among the trade by other respondent concerns. The trade is urged to order "direct from the mill" or to compare respondents' prices with those of "other mills." (R. 31; D–1600, Ex. 8.[7] See also D–1602, Ex. 10.) Frequently the language employed, while not directly stating that respondents are mills manufacturing their product from wheat, is calculated to convey this impression. (D–1597, Ex. 13; D–1599, Ex. 5; D–1601, Ex. 30; D–1604, Exs. 9, 12.) Most of the respondents use letterheads which, in addition to their trade names, contain the words "Manufacturers of High Grade Flour" or similar words. (R. Vol. II, 182–183; D–1597, Ex. 12; D–1598, Ex. 2; D–1600, Ex. 4. See also D–1602, Ex. 1.)

If respondents' representations are, as we have attempted to show, false and calculated to deceive a substantial part of the trade, they constitute an "unfair" method of competition. *Federal Trade*

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[7] The exhibits in the case have been filed with this Court as original exhibits and, by stipulation, may be referred to, so far as material, by either party. (R. Vol. II, 193–194.)

Commission v. *Winsted Hosiery Co.*, 258 U. S. 483, *supra,* sustained an order of the Commission which directed the respondent company to cease and desist from using the words "Merino," "Wool," or "Worsted" in any label or brand on underwear not composed wholly of wool. The Court held (pp. 492–493) that, although these words may have been long established in the trade and generally understood by it as indicating goods partly of cotton, their use was nevertheless an unfair method of competition since they were literally false and were calculated to deceive and did deceive a substantial portion of the purchasing public. We submit that there is no difference in principle between the use of a misleading trade-mark or brand and the use of a misleading trade name.

Respondents did a business in 1929 of over $5,600,000 (R. 24; Vol. II, 23, 62, 99, 138, 174), and a seventh concern, against which the Commission issued a like complaint, did a business in 1928 of $2,400,000 (R. 35, 76), making the total business of these blenders of flour who designate themselves mills over $8,000,000. In view of the volume of this business, any misrepresentation by respondents tending to divert trade clearly threatens their competitors with substantial injury. The case is therefore within the rule laid down in *Federal Trade Commission* v. *Raladam Company,* 283 U. S. 643, *supra.* In that case the Court, after stating that the Federal Trade Commission could deal with unfair practices only in relation to their actual or po-

tential effect upon the trade of competitors, said (p. 651):

> It is enough that there be present or potential substantial competition, which is shown by proof, or appears by necessary inference, to have been injured, or to be clearly threatened with injury, to a substantial extent, by the use of the unfair methods complained of.

We submit that it is immaterial that grinding mills sometimes purchase flour from other grinding mills and put it out under their own brands. This does not alter the fact that the business of the true miller, as ordinarily conducted, does not involve any intermediate sale of flour and does involve the safeguards as to uniformity and quality which result from the tests and analyses employed in their grinding business. And it appears that millers thus buy flour only in limited amounts or under exceptional circumstances. (R. 165, 227, 234.)

II

THE COMMISSION PROPERLY CONCLUDED THAT ITS ORDERS WOULD BE IN THE PUBLIC INTEREST

Section 5 of the Federal Trade Commission Act authorizes a proceeding thereunder if it shall appear to the Commission that action by it "would be to the interest of the public." As previously stated (*supra,* p. 8), the court below decided this case upon the narrow ground that, because the Commission had not found that respondents' products

were injurious to the public or inferior to those of their competitors, the proceedings were not in the public interest and amounted at most to a private wrong. It appeared to base this decision upon *Federal Trade Commission* v. *Klesner,* 280 U. S. 19, *supra.*

In that case the Commission entered an order directing a small trader in the District of Columbia to desist from using a trade name which another small trader had used earlier. The facts disclosed that the respondent had adopted this name out of spite, as the result of a controversy growing out of breach of a sublease. This Court said (p. 28) that the alleged unfair competition "arose out of a controversy essentially private in its nature." It therefore held that there was no element of public interest to justify the Commission in taking jurisdiction of this controversy. It said (p. 28):

> In determining whether a proposed proceeding will be in the public interest the Commission exercises a broad discretion. But the mere fact that it is to the interest of the community that private rights shall be respected is not enough to support a finding of public interest. To justify filing a complaint the public interest must be specific and substantial. * * * Sometimes [it is so], because, although the aggregate of the loss entailed may be so serious and widespread as to make the matter one of public consequence, no private suit would be

> brought to stop the unfair conduct, since the loss to each of the individuals affected is too small to warrant it.

We submit that the present proceeding is squarely within the illustration stated by this Court of a case where the public interest involved would warrant action by the Commission. Respondents sell their product throughout the Southeastern States and in competition with approximately 170 grinding mills selling in the same territory. (*Supra,* p. 6; R. 30.) In 1929 their business was over $5,600,000 and the business of the concerns against which the Commission brought this proceeding appears to have been at least $8,000,000. (*Supra,* p. 17.) The practices complained of, therefore, affect a large volume of business, many competitors, and a still larger number of purchasers. These aspects of the public interest were entirely ignored in the decision below.

In *Federal Trade Commission* v. *Sinclair Refining Co.,* 261 U. S. 463, 476, the Court, referring to the Trade Commission Act and the Clayton Act, said:

> The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain.

Since the primary object of the statute is to maintain fair competition, it seems erroneous to make protection of the health or pecuniary interests of

the ultimate consumer the sole test of public interest. If injury to the consumer is found, a proceeding under Section 5 may be especially in the public interest, but it may also be within the sphere of the public interest where a substantial amount of commerce is affected by the unfair practices and no particular trader is legally entitled, or sufficiently injured, to obtain redress.

In the illustration of a proceeding in the public interest, quoted (*supra*, pp. 19–20) from the *Klesner* case, one factor stated is that "no private suit would be brought to stop the unfair conduct, since the loss to each of the individuals affected is too small to warrant it." This is the situation here. In addition, it seems clear that no private suit to remedy the wrong would lie. It has been held that, apart from the Trade Commission Act, an action of unfair competition can be maintained only when a property right of the complainant has been invaded and that the complainant must show, in addition to misbranding or deception, that the wrongdoer has palmed off his goods as those of the complainant. *American Washboard Co.* v. *Saginaw Mfg. Co.*, 103 Fed. 281 (C. C. A. 6th); *Royal Baking Powder Co.* v. *Federal Trade Commission*, 281 Fed. 744, 750–752 (C. C. A. 2d).

If the purchasing public prefers, other things being equal, the flour of grinding mills to that of blenders, it is of public concern to prevent decep-

tive practices made in competition which tend to deprive purchasers of the opportunity to exercise this preference and which tend to deprive competitors of the advantage resulting from this preference. The only difference between this case and the *Winsted case, supra,* is that here the deception relates to the nature of respondents' business; there it related to the character of the goods themselves. But this distinction is of no importance where, as here, there are findings supported by testimony that a substantial number of purchasers believe that the price or quality of the goods in question is affected by the nature of the seller's business. (*Supra,* pp. 7, 13–14.)

The effect of the lower court's decision is that misrepresentation which diverts trade from competitors is not within the reach of the statute, provided there is no direct misrepresentation of quality. We submit that this test is unsound and contrary to the interpretation previously placed upon the Act. *Federal Trade Commission* v. *Balme,* 23 F. (2d) 615 (C. C. A. 2d), certiorari denied, 277 U. S. 598, sustained an order by the Commission which directed the respondent to desist from selling its hair dye in a container of the same general appearance as that used by a competitor. This representation did not relate to the quality of the goods. Furthermore, no question of inferiority was presented, there being testimony (p. 619) that respondent and its competitor used the same formu-

lae. The court, in holding that the proceeding was in the public interest, said (p. 620):

> The purchasing public should be protected from deception, if that deception results in their securing an article or product which they did not intend to purchase, as well as where an article is misbranded. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483, 42 S. Ct. 384, 66 L. Ed. 729; *Royal Baking Powder Co.* v. *Federal Trade Commission* (C. C. A.), 281 F. 744. The test of unfair competition is whether the natural and probable result of the use by a respondent of a label which is deceptive to the ordinary purchaser makes him unwittingly, under ordinary conditions, purchase that which he did not intend to buy. *Notaseme Hosiery Co.* v. *Straus* (C. C. A.), 201 F. 99.

In *Ohio Leather Company* v. *Federal Trade Commission*, 45 F. (2d) 39 (C. C. A. 6th), involving an order of the Commission prohibiting the use of the trade name "Kaffor-Kid" to describe a calfskin product, the court sent the case back to the Commission for further testimony on the question whether the public was misled by the alleged improper use of the term. There the same court which decided the present case stated (p. 41):

> The misleading of the ultimate public to its prejudice does not, of course, depend upon whether the substitute is equally as good as the original; the purchaser is en-

titled to get what he asks for, even if he is put off with something as good or better; but the qualities of the two articles are not immaterial in determining the purchaser's real intention and desire.

Federal Trade Commission v. *Pure Silk Hosiery Mills, Inc.*, 3 F. (2d) 105 (C. C. A. 7th), was a proceeding by the Commission to enforce an order under Section 5 directed against the sale of hosiery under a trade name which included the word "Mills" unless and until the company owned or operated a hosiery mill. The court granted an injunction to enforce this order. While the only question discussed by the court was the defense that the respondent, after it had acquired a minority stock interest in a hosiery mill, owned a mill within the meaning of the order, the decision necessarily sustained the validity of the Commission's order. (*Federal Trade Commission* v. *Balme, supra*, p. 618.)

In the present case, the court below recognized that there was a public interest in preventing unfair methods of competition when there was "flagrant oppression of the weak by the strong," as well as when direct injury to the purchasing public was shown. But the court did not content itself with saying, as was admitted, that there was no such "flagrant oppression" in this case. It said (R. Vol. II, 191) that such effect as the Commission's order might have upon the existing active competition would be in the direction of stifling rather than

of preserving it, "the grinding millers being strong concerns organized into powerful trade organizations." The underlying assumption appears to be that, when there are strong competitors, the public has no interest in preventing unfair methods of competition; that the Act intends to foster competition by permitting the relatively weaker concerns to use unfair methods of competition prohibited to their stronger rivals. We submit that neither the terms of the Act nor its history warrants this interpretation and that, in addition, there is nothing in the record to show that respondents are relatively weaker than the individual grinding mills. The court below appears to have based its statements concerning the "powerful trade organizations" of the grinding mills upon a statement made in *Freight Bureau* v. *Southern Railway Co.*, 41 I. C. C. 483, 488, *supra*, a case decided October 17, 1916.

In the court below respondents relied upon the fact that, after the taking of testimony had begun (R. 35), respondents offered to place on their letterheads, bags, invoices, etc., in conspicious lettering, the words "Not Grinders of Wheat," and in one case the words "Packed by Cherokee Mills" (R. 684–685). The Commission entered orders that these suggestions be considered at the time of final argument on the merits. (R. 22; Vol. II, 21, 59, 97, 136, 171.) The Commission could not properly decide whether or not these offers would effec-

tively cure the unfair methods of competition charged in the complaints until it had before it all the evidence which might be offered. In its final decision the Commission was not required to allow respondents to continue their misrepresentations, followed by a disavowal. The Commission was entitled to grant relief which its experience led it to believe would effectively put an end to the various forms of misrepresentation which it found had been practiced.

This is not a case like *N. Fluegelman & Co.* v. *Federal Trade Commission,* 37 F. (2d) 59 (C. C. A. 2d), where the trade name under attack had two meanings, one of which the respondent might legitimately use and one of which tended to deceive. In that case a manufacturer of cotton fabrics sold under the trade names "Satinmaid" and "Satinized." Since satin means both a certain kind of weave and goods made from silk, the court modified the Commission's order to prohibit use of these trade names unless words such as "a cotton fabric" or "no silk" were added in equally conspicuous letters.

The Commission's orders do not deprive the respective respondents of the value of their trade names except in so far as "its value may be in its deception." (See *Brougham* v. *Blanton Mfg. Co.,* 249 U. S. 495, 502.) The Commission's order would not prevent the partnership doing business as the Royal Milling Company from trading under such

names as Royal Flour Company, Royal Blending Company, Royal Processing Company, etc.

CONCLUSION

It is respectfully submitted that the decrees below should be reversed, with directions to affirm the orders of the Commission.

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DECEMBER, 1932.

APPENDIX

Section 5 of the Federal Trade Commission Act, c. 311, 38 Stat. 717, 719 (U. S. Code, Title 15, Sec. 45), provides, *inter alia:*

> That unfair methods of competition in commerce are hereby declared unlawful.
>
> The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.
>
> Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may

make application, and upon good cause shown may be allowed by the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such per-

son, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written peti-

tion praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

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